

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

MATTHEW KELLY, as Administrator of
the Estate of BRENDA SUE KELLY,

Plaintiff,

v.

CIVIL ACTION NO. 1:14-11041
(McDowell Co. Circuit Court
Case No. 14-C-10
Judge Booker T. Stephens)

SHERWOOD P. LEO, M.D.,

Defendant.

NOTICE OF REMOVAL

Pursuant to 28 U.S.C. § 1332, § 1441 and § 1446, Defendant Sherwood P. Leo, M.D. ("Dr. Leo"), by and through its counsel, hereby files the following Notice of Removal and removes this action from the Circuit Court of McDowell County, West Virginia, to the United States District Court for the Southern District of West Virginia, which is the judicial district in which the action is pending. Dr. Leo sets forth the grounds for removal as follows:

1. On or about January 17, 2014, Plaintiff Matthew Kelly, as Administrator of the Estate of Brenda Sue Kelly, commenced the above-captioned matter by filing a Complaint in the Circuit Court of McDowell County. Attached hereto as *Exhibit A* is a copy of the Docket sheet from the Clerk of the Circuit Court of McDowell County, Civil Action No.: 14-C-10, along with a copy of all pleadings in said action.

2. Plaintiff served his Complaint on Defendant Sherwood P. Leo on February 5, 2014.

3. In his Complaint, Plaintiff seeks to collect a monetary judgment and other relief from Dr. Leo under the theories of medical negligence and loss of consortium. Plaintiff alleges "severe physical pain and suffering, emotional pain and suffering, [and] loss of the enjoyment of life" (Complaint ¶ 20). Plaintiff seeks recovery for a list of alleged damages including medical expenses, lost wages, and mental anguish. (Complaint ¶¶ 21–23).

4. The United States District Court for the Southern District of West Virginia has jurisdiction over this civil action pursuant to 28 U.S.C. § 1441, because this action could originally have been filed in this court pursuant to 28 U.S.C. § 1332.

5. The filing of this Notice of Removal is timely, in that thirty (30) days have not elapsed from the date of Service of Process of Plaintiffs' Complaint upon Dr. Leo and it is being filed less than one year after the commencement of the action.

6. Upon information and belief and as alleged in his Complaint, Plaintiff Matthew Kelly is a resident of Mercer County, West Virginia. (Complaint ¶ 1).

7. Dr. Leo is a citizen of North Carolina and has been since the filing of Plaintiff's Complaint.

8. Plaintiff has either mistakenly or fraudulently pled that Dr. Leo is a citizen of West Virginia. (Complaint ¶ 2).

9. Because the plaintiff is a resident of West Virginia and Dr. Leo is not a West Virginia resident, there is complete diversity between the parties in this action. 28 U.S.C. § 1332(a)(1).

10. The \$75,000 amount in controversy requirement is met pursuant to 28 U.S.C. § 1446(c)(A)(ii). Plaintiff's initial pleading seeks a money judgment, but W. Va. Code § 55-7B-5 does not permit demand for a specific sum in medical professional liability claims.

11. Accordingly, this is an action "between citizens of different states" where "the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs," for purposes of 28 U.S.C. §1332(a) and §1441(a).

12. Notice of filing of this Notice of Removal will be served promptly on all adverse parties in this action.

13. Concurrent with the filing of this Notice of Removal, Dr. Leo is giving written notice of the Notice of Removal to the Circuit Court of McDowell County, West Virginia.

WHEREFORE, Defendant, Sherwood P. Leo, M.D., requests this action be removed from the Circuit Court of McDowell County, West Virginia to the United States District Court for the Southern District of West Virginia, at Bluefield.

Dated: 2/25/14

SHERWOOD P. LEO, M.D.

By Counsel

s/W.E. Sam Fox, II
W.E. Sam Fox, II (WV State Bar No. 5178)
Shereen S. Compton (WV State Bar No. 12282)
Flaherty Sensabaugh Bonasso PLLC
Post Office Box 3843
Charleston, West Virginia 25338-3843
(304) 345-0200
(304) 345-0260 (facsimile)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

AT BLUEFIELD

MATTHEW KELLY, as Administrator of
the Estate of BRENDA SUE KELLY,

Plaintiff,

v.

CIVIL ACTION NO. 1:14-11041
(McDowell Co. Circuit Court
Case No. 14-C-10
Judge Booker T. Stephens)

SHERWOOD P. LEO, M.D.,

Defendant.

CERTIFICATE OF SERVICE

I, W.E. Sam Fox, II, counsel for the defendant, Sherwood P. Leo, M.D., do hereby certify that on the 25th day of February, 2014, the foregoing "NOTICE OF REMOVAL" was served upon the following counsel of record by depositing true copies thereof in the United States Mail, postage prepaid, in envelopes addressed as follows:

William S. Adams, Esquire
Adams Legal Group, PLLC
P.O. Box 1178
Dellslow, WV 26531

Kathryn Reed Bayless, Esq.
The Bayless Law Firm, PLLC
1607 W. Main Street
Princeton, WV 24740
Co-Counsel for Plaintiff

s/W.E. Sam Fox, II
W.E. Sam Fox, II (WV State Bar No. 5178)

Shereen S. Compton (WV State Bar No. 12282)
Flaherty Sensabaugh Bonasso PLLC
Post Office Box 3843
Charleston, West Virginia 25338-3843
(304) 345-0200
(304) 345-0260 (facsimile)

CASE 14-C-10

MCDOWELL

PAGE 0001

MATTHEW KELLY

VS. SHERWOOD LEO

LINE DATE ACTION

1 01/17/14 COMPLAINT FILED, SUMMONS AND COMPLAINT SENT BACK TO COUNSEL
2 FOR SERVICE WITH 30 DAYS TO ANSWER.
3 02/06/14 SUMMONS AND AFFIDAVIT OF SERVICE ON SHERWOOD P. LEO M.D. SERVED
4 ON 2/05/14

A TRUE COPY TESTE
FRANCINE SPENCER CLERK
BY Jessie Anderson

BAYLESS LAW FIRM, PLLC
1607 W. Main Street
Princeton, West Virginia 24740
TELEPHONE: (304) 487-8707
FACSIMILE: (304) 487-8705

14-C-10-3
RECEIVED & FILED
CLERK OF COURT
MCDOWELL COUNTY WV
JAN 17 2014

KATHRYN REED BAYLESS

Michelle J. Evans, Admin. Asst.
Jackie C. Lane, Admin. Asst.

January 15, 2014

Francine Spencer
Clerk of Circuit Court
90 Wyoming Street, Suite 201
Welch, WV 24801

Re: Matthew Kelly, as Administrator of the Estate of Brenda Sue Kelly
v. Sherwood P. Leo, MD

Dear Ms. Spencer:

Please find enclosed an original **Civil Case Information Statement**, an original and two copies of the **Summons and Complaint** relating to the above matter. Kindly file the same with the Court and issue the Summons to be served on the within named Defendant, and return to me for service.

Please also find enclosed this firm's check in the amount of \$280.00 for the filing fee.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,


KATHRYN REED BAYLESS

KRB/jcl
Enclosures

cc: Matthew Kelly, w/Enc.
William S. Adams, Esq., w/Enc.

A TRUE COPY TESTE
FRANCINE SPENCER CLERK
BY Francine Spencer

RECEIVED 1-17-14
CIRCUIT CLERK
MCDOWELL COUNTY WV

CIVIL CASE INFORMATION STATEMENT

JAN 17 2014

CIVIL CASES

In the Circuit Court of McDowell County, West Virginia

I. CASE STYLE:

Plaintiff

Case# 14-c-10

Matthew Kelly, as Administrator of
the Estate of Brenda Sue Kelly.

Judge Stephano

v.

Defendant

Days to
Answer

Days to Answer
Discovery

Type of Service

Sherwood P. Leo, MD

30

Personal

A TRUE COPY TESTE
FRANCINE SPENCER CLERK
BY Francine Spencer

Original and 2 copies of complaint furnished herewith.

PLAINTIFF(S): MATTHEW KELLY, as Administrator
of the Estate of BRENDA SUE KELLY

CASE NUMBER: 14-C-10

DEFENDANT(S): SHERWOOD P. LEO, MD

II. TYPE OF CASE: Medical Malpractice

TORTS

OTHER CIVIL

<input type="checkbox"/> Asbestos	<input type="checkbox"/> Adoption	<input type="checkbox"/> Appeal from Magistrate Court
<input checked="" type="checkbox"/> Professional Malpractice	<input type="checkbox"/> Contract	<input type="checkbox"/> Petition for Modification of Magistrate Sentence
<input type="checkbox"/> Personal Injury	<input type="checkbox"/> Real Property	<input type="checkbox"/> Miscellaneous Civil
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Mental Health	<input type="checkbox"/> Other
<input type="checkbox"/> Other Tort	<input type="checkbox"/> Appeal of Administrative Agency	

III. JURY DEMAND: ☒ Yes ☐ No

CASE WILL BE READY FOR TRIAL BY (MONTH/YEAR) April, 2015

IV. DO YOU OR ANY OF YOUR CLIENTS OR WITNESSES IN THIS CASE REQUIRE
SPECIAL ACCOMMODATIONS DUE TO A DISABILITY OR AGE?

YES ☒ NO

IF YES, PLEASE SPECIFY:

Wheelchair accessible hearing room and other facilities

Interpreter or other auxiliary aid for the hearing impaired

Reader or other auxiliary aid for the visually impaired

Spokesperson or other auxiliary aid for the speech impaired

Other:

Attorney Name: KATHRYN REED BAYLESS

Representing:

Firm: BAYLESS LAW FIRM, PLLC

☒ Plaintiff ☐ Defendant

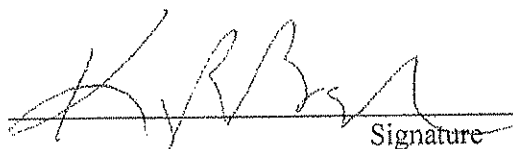
Address: 1607 West Main Street

☐ Cross-Complainant

☐ Cross-Defendant

Telephone: 304-487-8707

Dated:


Signature

☐ Pro Se

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

MATTHEW KELLY, as Administrator of
the Estate of BRENDA SUE KELLY,

Plaintiff,

v.

SHERWOOD P. LEO, M.D.,

Defendant.

CIVIL ACTION NO. 14-C-10
(Judge Stephen)

RECEIVED & FILED
CIRCUIT CLERK
MCDOWELL COUNTY WV

FEB 06 2014

To the above-named Defendant:

Sherwood P. Leo, M.D.
Welch Community Hospital
454 McDowell Street
Welch, WV 24801-2029

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon Kathryn Reed Bayless (Bayless Law Firm, PLLC), plaintiff's attorney, whose address is 1607 West Main Street, Princeton, W.VA. 24740 an answer, including any related counterclaim you may have, to the complaint filed against you in the above styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint and you will be thereafter barred from asserting in another action any claim you may have which must be asserted by counterclaim in the above styled civil action.

Dated: January 17, 2014

Francine Spencer
CLERK OF THE CIRCUIT COURT
of MCDOWELL COUNTY
Francine Spencer

A TRUE COPY TESTE
FRANCINE SPENCER CLERK
BY *Debra Anderson*

IN THE CIRCUIT COURT OF McDOWELL COUNTY, WEST VIRGINIA

MATTHEW KELLY, as Administrator of
the Estate of BRENDA SUE KELLY,

Plaintiff,

v.

Civil Action No. 14-C- 10

SHERWOOD P. LEO, M.D.

Defendant.

COMPLAINT

NOW COMES the Plaintiff, Matthew Kelly, as the Administrator of the Estate of Brenda S. Kelly, by counsel, William S. Adams and the law firm of Adams Legal Group, PLLC and Kathryn R. Bayless of the Bayless Law Firm PLLC, and brings this Complaint demanding damages from the Defendant. In support of this Complaint, Plaintiff alleges as follows:

1. Plaintiff, Matthew Kelly, is an adult person who resides in Princeton, Mercer County, West Virginia.
2. Plaintiff, Matthew Kelly, has been duly appointed as the Administrator of the Estate of Brenda S. Kelly, now deceased.
3. Defendant, Sherwood P. Leo, M.D. ("Defendant"), is a citizen and resident of Welch, McDowell County, West Virginia.
4. Defendant Sherwood P. Leo, M.D. is a physician licensed in the State of West Virginia and he practices medicine and specializes in the field of emergency medicine.

5. Defendant Sherwood P. Leo, M.D. practices his medical specialty at the Welch Community Hospital, located at 454 McDowell St., Welch, West Virginia 24801-2029.
6. Pursuant to West Virginia Code §56-1-1, venue is proper in the Circuit Court of McDowell County, West Virginia because all the events and omissions giving rise to the claims occurred in McDowell County.
7. The Circuit Court of McDowell County, West Virginia has general and specific personal jurisdiction over the parties to this civil action.
8. Defendant Sherwood P. Leo, M.D. is a health care provider as defined in ***West Virginia Code*** §55-7B-2(c).
9. All statutory prerequisites for filing this civil action under the provisions of the West Virginia Medical Professional Liability Act, ***West Virginia Code*** §§55-7B-1, et seq., as amended, have been satisfied and fulfilled.
10. Prior to and on or about July 26, 2012, the Defendant provided medical treatment to Brenda Sue Kelly when she visited the emergency department at the Welch Community Hospital.
11. On July 26, 2012, Brenda Sue Kelly was transported from the Welch Community Hospital to St. Mary's Hospital in Huntington, where she ultimately died.
12. During the multiple visits to the Welch Community Hospital, Ms. Kelly presented with abnormal vital signs and a fever.
13. Defendant, despite the multiple visits by Ms. Kelly to the Welch Community Hospital Emergency Department, failed to diagnose or adequately treat the cause of Ms. Kelly's abnormal vital signs and fever.

14. On July 26, 2012, the Defendant ordered an antibiotic for Ms. Kelly, which was ordered significantly late in the progress of Ms. Kelly's condition and which was contraindicated by her prior allergies listed in her medical history.
15. Defendant breached the applicable standard of care by failing to timely diagnose and treat the cause of Ms. Kelly's abnormal vital signs and fever.
16. Defendant breached the applicable standard of care by failing to order further diagnostic tests for Ms. Kelly.
17. Defendant breached the applicable standard of care by failing to adequately treat an infectious process with antibiotics in a timely fashion.
18. Defendant breached the applicable standard of care by ordering antibiotics that were contraindicated, based upon Ms. Kelly's known medical history.
19. As a direct and proximate result of the Defendant's failures and breaches of the applicable standard of care, Ms. Kelly suffered a rapid deterioration of her condition and progression of her disease processes, in the days leading up to and through July 26, 2012, until she ultimately died as a result of the bronchopneumonia and sepsis that the Defendant failed to diagnose and treat.
20. As a further direct and proximate result of the Defendant's failures and breaches of the applicable standard of care, Ms. Kelly sustained severe physical pain and suffering, emotional pain and suffering, loss of the enjoyment of life, and other liquidated and unliquidated damages and injuries.

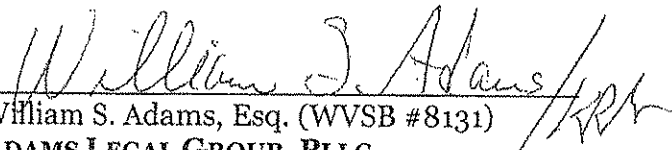
21. As a further direct and proximate result of the Defendant's failures and breaches of the applicable standard of care, Matthew Kelly, as the decedent's son, has suffered terrible sorrow, mental anguish, and solace, because of the loss of his mother's society, companionship, comfort, guidance, kindly offices and advice, for which he is entitled to recover damages, for the wrongful death of his mother.
22. As a further direct and proximate result of the Defendant's failures and breaches of the applicable standard of care, Ms. Kelly sustained lost income.
23. As a further direct and proximate result of the Defendant's failures and breaches of the applicable standard of care, Matthew Kelly, as the Administrator of the Estate of Brenda S. Kelly, incurred expenses for the care, treatment and hospitalization of the decedent incident to the injury resulting in her death and reasonable funeral expenses.

WHEREFORE, Plaintiff, Matthew Kelly, as the Administrator of the Estate of Brenda S. Kelly, demands judgment in favor of Plaintiff and against Defendant in such amount as will fully compensate him for the injuries, damages, and losses, together with pre- and post-judgment interest, costs, attorneys' fees, in an amount just and reasonable as determined by a jury, and such other relief as this Court deems appropriate.

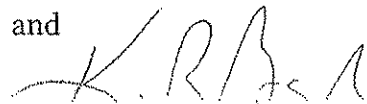
DEMAND FOR TRIAL BY JURY

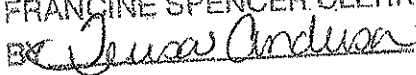
Plaintiffs demand a trial by jury upon all issues triable by a jury raised herein.

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William S. Adams, Esq. (WVSB #8131)
ADAMS LEGAL GROUP, PLLC
P.O. Box 1178
Dellslow, WV 26531
Telephone: 304-381-2166
Fax: 855-400-4481
badams@adams-legal.com

and


Kathryn Reed Bayless, Esq. (WVSB #0272)
THE BAYLESS LAW FIRM, PLLC
1607 W. Main St.
Princeton WV 24740
Telephone: 304-487-8707
Fax: 304-487-8705
kay@baylesslawfirm.com

A TRUE COPY TESTE
FRANCINE SPENCER CLERK


BAYLESS LAW FIRM, PLLC
1607 W. Main Street
Princeton, West Virginia 24740
TELEPHONE: (304) 487-8707
FACSIMILE: (304) 487-8705

KATHRYN REED BAYLESS

Michelle J. Evans, Admin. Asst.
Jackie C. Lane, Admin. Asst.

February 5, 2014

Francine Spencer
Clerk of Circuit Court
90 Wyoming Street, Suite 201
Welch, WV 24801

RECEIVED & FILED
CIRCUIT CLERK
MCDOWELL COUNTY WV
FEB 06 2014

Re: *Matthew Kelly, as Administrator of the Estate of Brenda Sue Kelly*
v. Sherwood P. Leo, MD
Civil Action No. 14-C-10

Dear Ms. Spencer:

Enclosed please find the original Summons and Affidavit of Service showing service upon Sherwood P. Leo in referenced matter on today's date.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,

Kathryn R. Bayless
KATHRYN REED BAYLESS

KRB/jcl
Enclosures

cc: Matthew Kelly, w/Enc.
William S. Adams, Esq., w/Enc.

A TRUE COPY TESTE
FRANCINE SPENCER CLERK
BY *Francine Spencer*

IN THE CIRCUIT COURT OF MCDOWELL COUNTY, WEST VIRGINIA

MATTHEW KELLY, as Administrator of
the Estate of BRENDA SUE KELLY,

Plaintiff,

v.

SHERWOOD P. LEO, M.D.,

Defendant.

CIVIL ACTION NO. 14-C-10

(Judge Stephen)

RECEIVED & FILED
CIRCUIT CLERK
MCDOWELL COUNTY WV

FEB 06 2014

To the above-named Defendant: Sherwood P. Leo, M.D.
Welch Community Hospital
454 McDowell Street
Welch, WV 24801-2029

IN THE NAME OF THE STATE OF WEST VIRGINIA, you are hereby summoned and required to serve upon Kathryn Reed Bayless (Bayless Law Firm, PLLC), plaintiff's attorney, whose address is 1607 West Main Street, Princeton, W.VA. 24740 an answer, including any related counterclaim you may have, to the complaint filed against you in the above styled civil action, a true copy of which is herewith delivered to you. You are required to serve your answer within 30 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint and you will be thereafter barred from asserting in another action any claim you may have which must be asserted by counterclaim in the above styled civil action.

Dated: January 17, 2014

Francine Spencer
CLERK OF THE CIRCUIT COURT
of MCDOWELL COUNTY

A TRUE COPY TESTE
FRANCINE SPENCER CLERK
BY Francine Spencer

AFFIDAVIT OF SERVICE
STATE OF WEST VIRGINIA
IN THE CIRCUIT COURT OF MCDOWELL COUNTY

RECEIVED & FILED
CIRCUIT CLERK
MCDOWELL COUNTY WV
FEB 06 2014

PETITIONER: Kelly
VS

CASE # 14-C-10

RESPONDENT:

Leo
I, David Belcher, being duly sworn, depose and say that on the 5th day of Feb at 9:55 AM executed service to, Dr. Sherwood Leo, by delivering a true copy of the Summons, Complaint Financial Statement, Certificate of Service and Documents Relevant; in accordance with State statutes in the manner marked below:

☒ **INDIVIDUAL SERVICE:** Served the within named person.

() **SUBSTITUTE SERVICE:** Served the within Summons and Complaint by delivering a copy of the _____ at _____'s dwelling place or usual place of abode to _____, a member of the said individual's family who is above the age of 16 years.

PLACE OF SERVICE: Walmart/Welch WV

DESCRIPTION OF INDIVIDUAL SERVED: Sex: ~~Female~~ ☒ Male
Race: (Asian) Approx. Age: (35) Approx. Weight: ()
Hair Color: (Blk) Approx. Height: (5'7") Glasses: (yes)
Additional Notes:

() **NON SERVICE**

I certify that I have no interest in the above action I am of legal age and have proper authority in the jurisdiction in which the service was made.

David A. Belcher

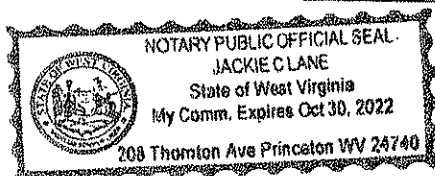
LEGAL PROCESS SERVER

David A. Belcher
526 Union Street
Bluefield, WV 24701
304-320-0736

Appointed in accordance with State Statutes.

NOTARY PUBLIC Jackie Lane

My commission Expires: October 30, 2022



A TRUE COPY TESTE
FRANCINE SPENCER CLERK

BY Debra Anderson